SYKT PEMBENAAN RAYA SDN BHD

v.

LANGKAWI MARBLE CO SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: D2-22-2470-89]
28 AUGUST 1997

CIVIL PROCEDURE: *Appeal - Notice of appeal - Notice of appeal unsealed and unsigned - Notice struck out - Appeal for reinstatement of notice of appeal - Whether notice was "brought" when there was default of service - Rules of the High Court 1980, O. 56 r. 1*

CIVIL PROCEDURE: *Service - Notice of appeal - Failure to serve notice as required - Whether court should allow appeal to be struck out - Whether another date should be given*

WORDS & PHRASES: *"Issued" - Rules of the High Court 1980, O. 56 r. 1(3)*

The plaintiff's action was struck out for want of prosecution on the application of the defendants. The plaintiff filed a notice of appeal and a date for the hearing was fixed. The plaintiff then served an unsealed and unsigned copy of the notice of appeal which bore no date of hearing on the defendants. On the day of the hearing neither party was present and the judge struck out the notice of appeal. The plaintiff then applied for reinstatement of the notice of appeal. The defendants raised a preliminary objection on the ground that the notice of appeal was **not** "served not less than two clear days before the date fixed for hearing the appeal" pursuant to O. 56 r. 1 of the Rules of the High Court 1980 ('the RHC'), and so the appeal had not been "brought" and therefore was not before the court. The plaintiff argued that the notice to be served need not be sealed and that as the defendants had knowledge that the notice of appeal was filed, the preliminary objection ought not to be upheld.

Held:

[1] The notice of appeal to be served is the notice that is "issued" and "issued" in O. 56 r. 1(3) of the RHC means issued by the court as was decided in *Ooi Chew Seng v. Ultratech Sdn. Bhd. & Ors.*

[1a] It could **not** be said that an appeal is nevertheless 'brought' if the respondent is aware of the appellant's intention to appeal, or the fact that he has filed a notice of appeal.

[2] The purpose of service, at least two clear days before the date of hearing, is to give sufficient time for the respondent to prepare and make ready for the appeal. The requirement is not for the purpose of enabling the respondent to know early that there is an appeal. The failure to serve the notice of appeal not less than two clear days before the date fixed for hearing the appeal, does not mean that there was no notice of appeal or that the notice of appeal that has been issued in time does not exist.

[2a] The word "brought" in O. 56 r. 1(2) of the RHC simply refers to the steps one needs to take if one wishes to take a matter up on appeal. Paragraph (2) requires one to inform the other party of one's intention to appeal by serving on him a notice in Form 114. Paragraph (3) requires the notice to be issued within five days after the judgment, order or decision was made. It implies that an appellant must file his notice of appeal within five days. The purpose of this time limit is so that the other side will not be subject to an appeal indefinitely.

[3] There is no justification for the ruling that because of the default as regards the time of service, the appeal is not 'brought', as if the notice of appeal is no longer valid, with the consequence that the appeal is struck off. Where the default is in not serving the notice at all, before the hearing date, it is wrong to treat the matter as a case of an appeal not 'brought', with the result that, where counsel for the appellant appears on the date fixed, he will have the notice of appeal struck out, because no appeal has been 'brought'.

[4] Where an appellant has failed to serve the notice of appeal, in fairness to the respondent, the appellant should not be allowed to proceed further in the appeal but not on the ground that no appeal has been 'brought'. Another date should be given, in which case service of the notice must be effected at least two full days again before that date. If service cannot be effected before that date, the appellant must file an affidavit as to the reasons for failure to serve, so that the court will have some material on which to consider whether to grant another date.

[4b] In the present case, the court did not agree that there was no appeal to be reinstated by reason that there was no appeal 'brought'.

[Preliminary objection dismissed.]

Cases referred to:

Public Feedmill (M) Sdn Bhd (in liquidation) v. Hai Yeu Hin [1994] 2 CLJ 802 ***(not foll)***

Ooi Chew Seng v. Ultratech Sdn Bhd & Ors [1997] 2 MLJ 344 ***(not foll)***

Permata Chartered Merchant Bank Bhd v. Hiew Fook Realty (Holdings) Sdn Bhd & Ors [1992] 1 MLJ 73 ***(dist)***

Legislation referred to:

Rules of the High Court 1980, O. 56 r. 1

For the plaintiff - James Monteiro; M/s Shearn Delamore & Co
For the first defendant - Shanti Segaran; M/s Mahadevi Nadchatiram & Partners

JUDGMENT

Abdul Aziz Mohamad J:

On 5 June 1996, the learned Senior Assistant Registrar, on the application of the first defendants, dismissed the plaintiffs' action for want of prosecution.

On 7 June the plaintiffs filed a notice of appeal to the Judge in Chambers. The Senior Assistant Registrar signed and sealed the notice on the same day after entering in it the date of hearing, 12 August. Also on the same day, the plaintiffs' solicitors served on the solicitors for the first defendants an unsealed and unsigned copy of the notice of appeal which, of course, did not bear the date of hearing.

As the sealed copy of the notice of appeal was not served on the solicitors for the first defendants before the hearing date, they were not aware of the date.

When the appeal came up for hearing on 12 August, neither side was present. So I struck out the notice of appeal. I did that on the assumption that the absence of the plaintiffs' solicitors meant that the plaintiffs were not interested to pursue the appeal.

The plaintiffs, by summons in-chambers dated 31 January 1997, now applies for reinstatement of the appeal. In his affidavit, the solicitor having charge of the case for the plaintiffs explains that the date of hearing of the appeal had not been recorded in the diary of his firm and therefore he was not aware of the date. Thus the absence of counsel for the plaintiffs on 12 August 1996. Since what I did on that date was to strike out the notice of appeal, the application is really an application for reinstatement of the notice of appeal.

On the hearing of the application, a preliminary objection was raised by learned counsel for the first defendants. It is founded on paras. (2) and (3) of r. 1 of O. 56 of the Rules of the High Court 1980. Those paragraphs provide as follows:

> (2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice in Form 114 to attend before the judge on a day specified in the notice.
>
> (3) Unless the court otherwise order, the notice must be issued within five days after the judgment, order or decision appealed against was given or made and served not less than two clear days before the day fixed for hearing the appeal.

Since in this case there was failure to serve the notice of appeal not less than two clear days before 12 August 1996, the day fixed for hearing the appeal, as required by para. (3), learned counsel for the first defendants, on the authority of *Public Feedmill (M) Sdn. Bhd. (in liquidation) v. Hai Yeu Hin* [1994] 2 CLJ 802, which was followed in *Ooi Chew Seng v. Ultratech Sdn. Bhd. & Ors.* [1997] 2 MLJ 344, submitted that the appeal had not been 'brought' and therefore was not before the court. In consequence, there is nothing to reinstate and the plaintiffs' application should be dismissed.

Learned counsel for the plaintiffs submitted that para. (3) does not say that it is the sealed copy that must be served at least two clear days before the day fixed for hearing the appeal. There is no merit in that submission. The notice to be served is the notice that is 'issued' and, as was decided in *Ooi Chew Seng,* 'issued' in para. (3) means issued by the court.

Learned counsel for the plaintiffs further submitted that the reason why VC George J, in *Public Feedmill,* allowed the preliminary objection and struck off the appeal was because the respondent in that appeal had, for over a year, not realised that the appellant had filed an appeal. It was therefore submitted that in this case, as the first defendants were aware, even from the date when the notice of appeal was filed, that the plaintiffs were appealing, the preliminary objection ought not to be upheld.

It is true that at p. 39E-G of the judgment, VC George J, explained why it is salutary that the notice of appeal should be served, as he put it, 'within a prescribed period'. It is so that the respondent will not be left unaware of the appellant's intention to appeal. But the reason VC George J, struck off the appeal was because, in his view, the appeal could not be said to have been 'brought'. According to him, unless the notice of appeal is issued and served according to the time prescribed in para. (3), the appeal cannot be said to have been 'brought'. If that proposition is correct, and in a particular case para. (3) has not been complied with as to service, I do not think it can be

said that an appeal is nevertheless 'brought' if the respondent is otherwise aware of the appellant's intention to appeal or of the fact that he has filed a notice of appeal.

The case of *Permata Chartered Merchant Bank Bhd. v. Hiew Fook Realty (Holdings) Sdn. Bhd. & Ors* [1992] 1 MLJ 73 cited by learned counsel for the plaintiffs is irrelevant because it does not concern the question of non-compliance with para. (2) or (3).

Those are the only arguments advanced by learned counsel for the plaintiffs in the hope of persuading me not to follow *Public Feedmill*. I do not find that they are sound arguments.

I nevertheless am unable to agree that failure to serve the notice not less than two clear days before the day fixed for hearing the appeal results in no appeal having been brought, as if the notice of appeal that has been issued in time does not exist, so that there is, in this case, no appeal, or rather notice of appeal, to be reinstated. With respect, I think too much significance ought not to be placed on the word 'brought' in para. (2) so that the mind is led to question whether an appeal has or has not been brought should any of the requirements of the two paragraphs not be complied with. The word 'brought', I think, is employed in para. (2) as an appropriate word, as a matter of style, to be employed for conveying the essential instruction that the paragraph seeks to convey, which is simply as to the steps one needs to take if one wishes to take a matter up on appeal. Paragraph (2) requires one to inform the other party of one's intention to appeal by serving on him the notice in Form 114.

Paragraph (3) requires the notice to be issued within five days after the judgment, order or decision appealed against was given or made. It implies the appellant must file the notice of appeal also within five days. The purpose of the time limit is obviously in order that the other side will not be subject to an appeal indefinitely. He will know within the five days, by making a file search, whether the losing side intends to appeal. If the losing side fails to file the notice of appeal and have it issued within the five days, then, unless the court extends the time, the consequence will be that he becomes debarred or disqualified from appealing. Where the notice is filed and issued in time, whether the appeal will be heard early or late depends on the court, which will fix the date in the notice of appeal. That is not controlled by para. (3). Another requirement of para. (3) is that the notice must be served not less than two clear days before the day fixed by the court. Now that requirement, in my opinion, is not for the purpose of enabling the respondent to know early that there is an appeal, because the date of hearing may be several months from the date of issue of the notice. In this case it was more than two months.

If the notice were served three days before the date of hearing, which would be alright, the respondent would still not have known early of the intention to appeal. If the intention was to give early notice, para. (3) would have provided that the notice must be served within a number of days after its issue. The purpose of service at least two clear days before the hearing date is to give sufficient time for the respondent to prepare and make himself ready for the appeal.

That being the purpose of the two-day service, the question that arises is what should be the consequence of failure to serve the notice as required by para. (3). Even if it were a one-day service, there would be failure alright to comply with para. (3). The consequence should be, if the respondent's counsel is present and complains about the short service, that another date be given so that he will have sufficient time to prepare for the appeal, and probably costs for the day should be ordered for the respondent's counsel. If he is willing to proceed with the appeal, the hearing should proceed. If the respondent's counsel is absent, another date should be given. But there would, in my opinion, certainly be no justification for ruling in such a case that because of the default as regards the time of service, the appeal is not brought – as if the notice of appeal were no longer valid – with the consequence that the appeal is struck off. Such as a consequence would bear no relationship to what I believe to be the purpose of the time requirement as to service. There is, or should be, a purpose behind every procedural requirement, and the consequence of non-compliance with a requirement should be commensurate with the need to achieve the purpose of the requirement.

Equally, in my opinion, it would be wrong, where the default is in not serving the notice at all before the hearing date, to treat the matter as a case of an appeal not brought, with the result that, where counsel for the appellant appears on the date fixed, as he normally would, he would be told that that is the end of the matter, or he would have the notice of appeal struck out, because no appeal has been brought. The question that should arise in such circumstances is whether the court should fix another date of hearing or should refuse to fix another date of hearing, the refusal being on the ground that, because of the appellant's lack of diligence in serving the notice of appeal and in fairness to the respondent, the appellant should not be allowed to proceed further in the appeal and not on the ground that no appeal has been brought. At least another date should be given, in which case service of the notice must be effected at least two full days again before that date. If service cannot be effected before that date, the appellant must file an affidavit as to the reasons for failure to serve so that the court will have some material on which to consider whether to grant another date.

For those reasons, I respectfully disagree that in this case there is no appeal to be reinstated by reason of no appeal having been brought. In any case, what is to be reinstated is the notice of appeal that I struck out, which had been issued in time. I therefore dismiss the preliminary objection.

Reported by Michele Saw